Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1333

DONALD A. RADO,

Petitioner,

v.

STATE OF CONNECTICUT AND JOHN MANSON, COMMISSIONER OF CORRECTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1113—August Term, 1978.

(Argued May 2, 1979 Decided October 3, 1979.)

Docket No. 78-2154

DONALD A. RADO,

Petitioner-Appellee,

—against—

STATE OF CONNECTICUT, et al.,

Respondents-Appellants.

Before:

FRIENDLY and MULLIGAN, *Circuit Judges,*
and GAGLIARDI, *District Judge.**

Appeal from a judgment of the District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge,* granting petition for habeas corpus based on violations of petitioner's rights under the Confrontation and Due Process Clauses. Reversed.

* The Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, sitting by designation.

DAVID S. GOLUB, Esq., Stamford, Ct. (Silver, Golub & Sandak, P.C.), *for Petitioner-Appellee.*

ROBERT E. BEACH, JR., Esq., Wallingford, Ct. (Assistant State's Attorney, State's Attorney's Office), *for Respondents-Appellants.*

GAGLIARDI, *District Judge:*

The State of Connecticut appeals from a judgment of the United States District Court for the District of Connecticut (Blumenfeld, J.) ordering the release of Donald A. Rado from custody unless the State elects to retry Rado within sixty days. In 1972, after trial by jury in the Connecticut Superior Court (Speziale, J.), Rado was convicted of the crimes of robbery in the first degree and conspiracy and was sentenced to a six to twelve year period of incarceration. The Connecticut Supreme Court affirmed the judgment of conviction. *State v. Rado,* 172 Conn. 74, 372 A.2d 159 (1976), *cert. denied,* 430 U.S. 918 (1977).[1] After a hearing, the Connecticut district court held, in an unreported memorandum decision, that Rado's conviction had been obtained in violation of his constitutional rights under the Confrontation Clause and the Due Process Clause. For the reasons which follow, we reverse.

1 During the four-year pendency of his state appeal, Rado was free on a $75,000 property bond. In 1977 the Connecticut district court granted Rado's motion for bail on similar terms pending a final disposition of the case on the merits. *Rado v. Manson,* 435 F.Supp. 349 (D. Conn. 1977).

The Facts

The state charged that in July, 1972 Rado met with three other men, Sean Donnelly, Wayne Epprecht and Fred Hall, at his Waterbury, Connecticut home to plan the armed robbery of a jeweler's widow, who lived nearby. Rado was not accused of having actually committed the substantive offenses of burglary and robbery, but of selecting the victim, instructing the robbers how to proceed, and supplying them with walkie-talkies and a gun with which to perpetrate the crime. Donnelly, Epprecht and Hall pled guilty to various charges stemming from the robbery and were called upon to testify at Rado's trial in December 1972.

The trial lasted two weeks. The principal state witnesses were Donnelly and Epprecht, both of whom testified that on the evening of July 2, 1972, they met with Rado and Hall at Rado's home and discussed the proposed robbery. Rado pointed out the victim's house, which was directly opposite and clearly visible from the back porch of his own, and stated that money and jewelry could likely be found there. The following day, July 3, Hall drove Donnelly and Epprecht in his car to Rado's home. The four men conferred in the basement of the home, where Rado gave Epprecht a .32 caliber pistol and Hall gave Donnelly a .38 caliber pistol. Rado instructed Donnelly and Epprecht to use the pistols in the course of the robbery, gave Donnelly a walkie-talkie unit to carry with him during the crime and agreed to remain at home for its duration "in the event anything happened."

Donnelly and Epprecht further testified that Hall drove them to the victim's home and remained in his car. While carrying a pine bush in an attempt to conceal their identities, Donnelly and Epprecht forced their way into the house, struck and bound the victim, and ransacked the house, taking several items of jewelry. When surprised by a neighbor, Donnelly and Epprecht fled, dropping Rado's walkie-talkie unit in their haste, and were driven by Hall back to Rado's home where they changed their clothes and returned the pistols to Rado.

Attacking the credibility of these two witnesses, the defense uncovered some minor inconsistencies in their respective accounts of the events of July 3 (*e.g.*, the precise time of day that they arrived at Rado's house, the manner in which they got there, and their activities earlier that day immediately prior to arrival). In addition, the defense sought to impeach Donnelly with prior inconsistent statements that he made to police concerning disposal of the guns used in the robbery and his admission that he had been using narcotics in July, 1972. Epprecht admitted perjuring himself concerning his prior contacts with the Waterbury area. On the basic details of the crime, however, Epprecht and Donnelly's respective accounts were mutually corroborative and remained unshaken.[2] Moreover, strong circumstantial evidence of Rado's guilt was adduced by the state. An employee of Radio Shack, an audio equipment store in Waterbury, testified that the walkie-talkie dropped by Donnelly and found near the scene of the

2 Two defense witnesses, however, Rado's wife and his next door neighbor, testified that Donnelly and Epprecht had not been in Rado's house on the night of July 2.

crime had identical serial numbers to a walkie-talkie sold in June, 1962 to a person identifying himself as D. Rado, 47 Mildred Avenue, Waterbury, Connecticut (Rado's address). The pistol used by Epprecht during the robbery was found in a search of Rado's house.[3] Fearing that the jury might nonetheless have drawn unfavorable inferences from Hall's failure to testify, the state called Hall to the stand.

On November 28, 1978, several days prior to the commencement of Rado's trial, pursuant to a plea bargain, Hall agreed to plead guilty to a charge of conspiracy in a superseding information in exchange for the state's attorney's promises to enter a nolle prosequi on the substantive offenses of robbery and burglary contained in the original information and to recommend a sentence of two to four years. It was also agreed that Hall could be subpoenaed by either side at Rado's trial, that the jury would not be informed of Hall's guilty plea, and that the state's attorney would recommend a lesser sentence if Hall cooperated in Rado's prosecution. The state's attorney also agreed that he would not contest Hall's right to assert his privilege against self-incrimination if Hall was called to testify and if Hall elected to do so. The attorneys informed Judge Speziale, who later presided over Rado's trial, of the terms of the plea bargain, except for the state's agreement to honor Hall's possible assertion of the fifth amendment privilege. The judge stated that if he were unable to agree to the recommended sentence after seeing the presentence report, he would permit Hall to withdraw his

3 Through several witnesses, it was proven that pine needles found in Hall's car were of the same genus as the bushes used by Donnelly and Epprecht to camouflage their approach to the victim's house.

plea. Hall entered his guilty plea to the conspiracy charge in open court. The prosecutor recited the facts of the robbery, implicating Rado, Donnelly, and Epprecht as well as Hall. Asked by the court if he had anything to add to the recitation, Hall responded "No, sir." When asked if the facts as thus set forth were "substantially correct and accurate," Hall stated "Yes, sir." Hall's replies were not made under oath. The court accepted Hall's plea, the remaining counts were nollied, and further proceedings were scheduled for January, 1973.

It is undisputed that prior to calling Hall to the stand at Rado's trial, the state's attorney did not know whether or not Hall would in fact assert his Fifth Amendment privilege. At the outset of his direct examination, Hall freely testified that he was a Waterbury resident and had known Rado for twelve years, had been employed by Rado in two separate Connecticut restaurants, and had become Rado's friend. Hall identified Rado's house in a photograph and stated that he had been a visitor there from time to time. He also testified that he had made Epprecht's acquaintance while working in Florida, had given Epprecht his phone number upon returning to Connecticut, and that he met Epprecht in July 1972 in Connecticut. Hall refused to state precisely where he again met Epprecht on the ground that his answer might tend to incriminate him. The court ordered Hall to answer, however, and he complied.

The state's attorney proceeded to question Hall about his car and its confiscation by the police. When Hall claimed to be unable to identify his car in a photograph, the court declared him to be a hostile witness and ruled that the state was entitled to

"cross examine" him. Hall admitted that in July, 1972, he had a blue suitcase in his car that belonged to Donnelly and Epprecht and contained their clothes, but he claimed that he was not certain how the suitcase found its way into the car's trunk. The state's attorney then returned to the subject of Hall's relationship with Rado. Hall invoked the privilege against self-incrimination when asked how well he knew Rado. At the court's direction, and once again without any objection to Hall's assertion of the privilege by the state's attorney, Hall responded that Rado was a "social acquaintance".

The state's attorney's questioning then shifted to the events leading up to the robbery. Asked if he had ever taken Epprecht and Donnelly to Rado's house, Hall again asserted the Fifth Amendment privilege. The judge excused the jury and explained to Hall that because he had pleaded guilty to the conspiracy charge his claim of privilege lacked merit. Hall's attorney was not present in the courtroom and the judge refused to hear argument from Rado's counsel on the question of Hall's privilege. Upon the jury's return, Hall again refused to answer whether he had ever brought Donnelly and Epprecht to Rado's house and asked to speak to his attorney. At the court's repeated direction, Hall finally answered that he had met with Epprecht and Donnelly at Rado's house on July 3, 1972. Although he initially refused to answer whether he had seen a walkie-talkie or a gun in Rado's house on that day, the court again ordered him to answer. In each instance, Hall responded that he was not sure.

The state's attorney next asked Hall whether he had planned the July 3d robbery with Rado, Epprecht and Donnelly. On four consecutive occasions, the court ordered Hall to answer this question, but each time Hall invoked his fifth amendment privilege. The court again excused the jury and warned Hall that his continued refusal to answer questions would result in his being found in contempt. Hall explained that he was acting on his attorney's advice and that he had not spoken to Rado about testifying. The state's attorney offered to withdraw the question and, upon the jury's return to the courtroom, the question was withdrawn.

At this juncture, the state's attorney directed Hall's attention to the guilty plea proceedings of the previous week:

"Q. Mr. Hall, do you remember being in Court here, in this courtroom here, on November 28, 1972?

A. Yes, I do.

Q. And I believe your attorney, Mr. Zeldes, was here with you; do you recall that?

A. Yes.

Q. Do you recall that the following occurred:—

[A defense objection was overruled.]

"Q. Do you recall my saying in your presence:

'Yes, your Honor. On July 3rd, 1972, the home of a Mrs. Hyman, in the Bunker Hill section of Waterbury, was entered by Sean Donnelly and Wayne Epprecht. They were at the time armed with firearms. They had been driven to the scene by this accused in his own car'? That is referring to you.

Q. You were here with Mr. Zeldes?

A. Yes.

'Donnelly and Epprecht carried with them a bush, by means of which they gained entry in the home and attempted to commit the crime of robbery and burglary in the first degree. Prior to driving to the home, this scheme, this plan to commit this crime had been discussed with the conspirators Rado, Donnelly, Epprecht, and Hall. That is the factual recitation.'

And the Court said: 'Frederick Hall, you heard the State's Attorney set forth the facts here at the request of the Court. Do you have anything to add to the statement as set forth by Mr. McDonald at this point?' And you recall that you answered: 'No, sir' do you remember that?

A. Yes.

Q. Was that a true recitation of what happened?

The Witness: If your Honor please, I would like to talk to you.

The Court: You want to speak to the Court in the absence of the jury?

The Witness: Yes, I would.

The Court: I am going to excuse you, ladies and gentlemen.

The judge held unreported bench conferences first with Hall and then with counsel. The state's attorney thereupon withdrew the last question. The jury was called back and informed of its withdrawal. The state's attorney then directed Hall's attention once again to the November 28th plea hearing and stated:

Q. Now, do you recall, Mr. Hall, being in Court again on November 28, 1972, when the

question and answers that I have just read to you were asked? Do you recall that?

A. Yes.

Q. You were here with Mr. Zeldes?

A. Yes.

Q. And you recall that after you were asked by the Court if you had anything to add to the statement as set forth by Mr. McDonald, at this point you answered, 'No, sir.'

Then the Court said: 'Are the facts set forth by Mr. McDonald substantially correct and accurate?'

And you replied: 'Yes, sir.'

Do you recall giving that answer to the Court?

A. Yes.

Q. In the presence of your attorney?

A. Yes.

Q. That the statement of facts that was read at that time was accurate, substantially correct and accurate; do you recall that?

A. Yes.

Q. Do you recall that part of that recitation included the words "prior to driving to the home, this scheme, this plan to commit this crime had been discussed with the conspirators Rado, Donnelly, Epprecht, and Hall; do you recall that being said in Court?

The Court: He previously answered that he did recall it in a prior question, Mr. McDonald.

Mr. McDonald: Yes.

The Court: He is asking you again: Do you recall it?

The Witness: He is asking me the same question again?

By Mr. McDonald:

Q. Yes. You already answered that you did.
A. It would be my same answer.

The state's attorney next sought to explore Hall's possible bias in favor of petitioner. When Hall stated that he could not remember how many times he had eaten lunch with Rado since the commencement of the trial, the state's attorney asked him whether Hall had a bad memory. Hall began to state that he did not wish to answer, but before he could finish the court excused the jury and immediately found Hall in contempt.

After a recess, Rado's counsel moved for a mistrial. The motion was denied, and the jury returned to the courtroom. Rather than repeating the question about Hall's memory, the state's attorney asked the following series of questions:

"Q. Mr. Hall, did you plan at Mr. Rado's home on the afternoon of July 3, 1971, with Epprecht and Donnelly, together with Mr. Rado, to rob Mrs. Hyman?

The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.

Mr. McDonald: I won't press the question, your Honor.

By Mr. McDonald:

Q. In your presence were firearms given to Epprecht and Donnelly at the home of Donald Rado?

The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.

Mr. McDonald: I won't press that question.

By Mr. McDonald:

Q. Were the walkie-talkies given to these men or to Donnelly and to you by Mr. Rado to perpetrate this armed robbery against Mrs. Hyman on that day?

The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.

By Mr. McDonald:

Q. Can you see the home of Mrs. Hyman from the back porch of Mr. Rado's house?

The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me."

At that point, the state's attorney concluded his direct examination.

On cross-examination, Rado's counsel asked Hall whether he had been asked to sign a statement implicating Rado in the robbery and whether the state's attorney had offered a recommendation of a lenient sentence in return for Hall's testimony. Hall asserted his Fifth Amendment privilege once again, but at the court's direction responded that his attorney had been offered a deal, the specifics of which he could not remember and that his attorney had asked him to sign a statement incriminating Rado but that he had refused to do so. Hall then explained how he,

Epprecht and Donnelly arrived at Rado's house on July 3rd. Hall testified that his car had broken down early that morning and he had asked Rado to pick up his friends Epprecht and Donnelly at a motel in town. Rado brought Epprecht and Donnelly to Hall's house while Hall repaired his car. After fifteen or twenty minutes, Rado, Epprecht and Donnelly left. When asked if he had ever been to the Radio Shack store in Waterbury, Hall asserted his Fifth Amendment privilege and Rado's counsel withdrew the question.

On redirect, Hall testified that after Rado, Epprecht, and Donnelly left Hall's house, Rado brought Epprecht and Donnelly to Rado's house and that Hall met them there that afternoon. When the state's attorney questioned Hall about his reluctance to sign any written statements about the crime, Hall again raised the privilege and these questions were withdrawn. When the state's attorney concluded his redirect, the court again excused the jury. The court noted that there were several questions asked by both sides which the witness refused to answer, but that neither side had pressed for answers to those questions. The court then vacated the finding of contempt and released Hall from custody. Hall was excused, and the jury returned to the courtroom.

II. The Constitutional Claims

Rado raised two constitutional claims below, both of which the district court found to be meritorious. First, the court held that the state's attorney's recitation from the transcript of Hall's plea hearing violated Rado's right to confront the witnesses against

him. Second, the court held that the last four questions by the state's attorney on direct examination were posed notwithstanding the expectation that Hall would assert his privilege against self-incrimination and that they thus constituted prosecutorial misconduct and a denial of due process of law.

A. *The Confrontation Clause Claim*

The Confrontation Clause of the Sixth Amendment, applicable to the states via the Due Process Clause of the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400 (1965), guarantees to a criminal defendant the right "to be confronted with the witnesses against him." The origins of the clause have been traced to the desires of the Framers to eradicate "trial by affidavit", a procedural abuse common during the colonial era, and to ensure the defendant the opportunity to challenge his accusers face-to-face before a jury. *California v. Green*, 399 U.S. 149, 156 (1970); *United States v. Belle*, 593 F.2d 487, 502 n.4 (3d Cir. 1979) (en banc) (Gibbons, J., dissenting). "[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause." *California v. Green, supra*, 399 U.S. at 157. These values are usually served by providing the defendant with adequate opportunity to cross-examine the state's witnesses, *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), although there may be instances in which the "indicia of reliability" are so strong that an extrajudicial statement may be placed before the jury even though there is no opportunity for the defendant to confront the declarant. *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion). In all instances, however,

"[t]he decisions of [the Supreme] Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Id.*, *quoting California v. Green, supra,* 399 U.S. at 161.[4]

As he did in the court below, Rado has placed his principal reliance upon the case of *Douglas v. Alabama, supra.* In *Douglas,* two defendants were tried separately on charges of assault with intent to murder. Defendant Loyd was tried first and convicted. The state then called him to testify at

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4 The Confrontation Clause serves many of the same values as the rule against hearsay, but they are not congruent evidentiary principles. The admission of an extrajudicial statement pursuant to a recognized hearsay exception may nonetheless violate the Confrontation Clause; conversely, the admission of such a statement in violation of hearsay rules does not necessarily result in denial of confrontation rights. *California v. Green, supra,* 399 U.S. at 155-56. Thus, it is not particularly relevant to our task to determine whether the state's attorney's recitation of the questions and answers at Hall's plea hearing was admissible for substantive purposes under Connecticut's hearsay rules. *See id.* at 164 ("there is little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well").

It may be noted parenthetically, however, that under the Federal Rules of Evidence, Hall's answers to the state's attorney's incriminating questions at his plea hearing might constitute statements against penal interest pursuant to Rule 804(b)(3). *See, e.g., Chambers v. Mississippi,* 410 U.S. 284, 299 & n.18 (1973); *United States v. White,* 553 F.2d 310, 312-14 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977). Such statements, however, are not admissible in federal court unless the declarant is "unavailable". Although a declarant who "persists in refusing to testify concerning the subject matter of his statement despite a court order to do so" is considered to be "unavailable" under Rule 804(a)(2), there was no such order with respect to the question at issue during Hall's direct testimony.

Douglas' trial. Because Loyd wished to appeal his conviction, he gave only his name and address and refused to answer any questions put to him concerning the alleged crime, citing his privilege against self-incrimination. The court, on the state's motion, declared Loyd to be a "hostile witness" subject to cross-examination. The prosecutor then produced a document purporting to be Loyd's signed confession and read it aloud in the presence of the jury, pausing every few sentences to ask Loyd if he had made the statement in question. In all, the prosecutor posed some 21 questions, occupying seven pages in the printed record. Loyd asserted the privilege and refused to answer after each question. The state then called three law enforcement officers who identified the document produced by the prosecutor as Loyd's signed confession. The confession incriminated Douglas, and he was convicted. Reversing Douglas' conviction, the Supreme Court unanimously held that Douglas' inability to cross-examine Loyd as to his alleged confession violated his Confrontation Clause rights. *Id.* at 419.

> Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner's act and of the requisite intent to murder. Although the [prosecutor's] reading of Loyd's alleged statement, and Loyd's refusal to answer, were not technically testimony, the [prosecutor's] reading may well have been the equivalent in the jury's mind of testimony that

> Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. Since the [prosecutor] was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him.

Id.

Although the facts in *Douglas* resemble to some extent those of the instant case, we believe that *Douglas* is distinguishable in several important respects. First, the recitation of Hall's answers to the state's attorney's questions at the plea hearing were neither "crucial" to the state's case against Rado, *Douglas v. Alabama, supra,* nor "devastating" to Rado's defense. *Bruton v. United States,* 391 U.S. 123, 136 (1968). *See, e.g., Dutton v. Evans, supra,* 400 U.S. at 87; *United States v. Wright,* 588 F.2d 31, 38-39 (2d Cir. 1978), *cert. denied,* 99 S.Ct. 1236 (1979); *United States v. Mangan,* 575 F.2d 32, 44 (2d Cir. 1978), *cert. denied,* 439 U.S. 931 (1979); *United States v. White,* 553 F.2d 310, 314 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977); *United States v. Puco,* 476 F.2d 1099, 1102-08 (2d Cir.), *cert. denied,* 414 U.S. 844 (1973); *United States v. Rogers,* 549 F.2d 490, 500 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977). Because the extrajudicial statements in *Douglas* were the *sole* direct evidence of the defendant's guilt, they "clearly bore on a fundamental part of" and "added critical weight to" the state's case.

380 U.S. at 420. In the instant case, by contrast, the direct testimony of Donnelly and Epprecht and strong circumstantial evidence provided by the walkie-talkie and pistol traced to his possession had seriously weakened Rado's defense. This strong evidence of guilt obviously reduced the deleterious impact of the state's attorney's recitation.

Second, unlike the declarant in *Douglas,* Hall was available for effective cross-examination concerning the veracity of his extrajudicial statement. The trial judge ruled that Hall could not assert the Fifth Amendment privilege because of his plea of guilty to the conspiracy charge. Even if it were determined that this ruling was erroneous,[5] *Douglas* clearly holds that resolution of a Confrontation Clause claim does not turn upon the validity of the declarant's claim of privilege. 380 U.S. at 420. The issue remains whether or not effective confrontation was possible. Hall was a reluctant witness, but it suffices to note that at the court's direction, and under penalty of contempt, he responded to questions concerning such matters as the circumstances under which he met

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5 Whether or not this is the case is open to dispute. Under Connecticut law, a nollied charge may be reopened by the prosecution within thirteen months. *See v. Gosselin,* 133 Conn. 158, 161, ___ A.2d ___ (1946). Therefore, it may be argued, on the one hand, that Hall risked self-incrimination on the charges of robbery and burglary which had been nollied pursuant to the plea bargain. *See, United States v. Yurasovich,* 580 F.2d 1212, 1218 (3d Cir. 1978), *cert. denied,* 99 S.Ct. 1537 (1979) ("if the witness is still subject to prosecution for other crimes which his testimony might tend to reveal, the privilege remains"). Alternatively, it might be contended that Hall would be entitled to "specific performance" of his plea bargain agreement, under which the substantive counts would be dismissed. *See United States v. Rocco,* 587 F.2d 144, 148 n. 12 (3d Cir. 1978) citing *Santobello v. New York,* 404 U.S. 257 (1972).

Rado and Epprecht, when counsel insisted upon an answer. Although Hall never answered any questions regarding the details of the robbery, it is by no means clear that he would have continued to refuse to answer if the parties had insisted. Moreover, unlike the declarant in *Douglas*, Hall admitted that he had made the extrajudicial statement implicating Rado and had vouched for its accuracy when made.[6] Counsel for Rado could have attempted to show that Hall had confessed to a crime he had not committed or, more likely, that the portions of his statement implicating Rado were untrue. Counsel's failure to cross-examine Hall in this manner, or to seek the aid of the court in eliciting this testimony, did not render Hall unavailable for the purposes of the Confrontation Clause. *See United States v. Insana*, 423 F.2d 1165, 1168 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); *Wade v. Yeager*, 415 F.2d 570 (3d Cir.), *cert.*

6 In *Nelson v. O'Neil*, 402 U.S. 622 (1971), the Supreme Court held that the declarant need not specifically affirm a prior statement as his in order to satisfy Confrontation Clause requirements. In *Nelson*, the declarant denied making the extrajudicial statement attributed to him, but was available to testify as to the underlying facts. Whether the declarant (1) denies having made the extrajudicial statement, *United States v. Ballentine*, 410 F.2d 375, 376-77 (2d Cir. 1969), *cert. denied*, 397 U.S. 928 (1970); *United States v. Peterson*, 435 F.2d 192, 195-96 (7th Cir. 1970), *cert. denied*, 403 U.S. 907 (1971); (2) admits having made the statement, but denies its truth; *United States ex rel. Pugach v. Mancusi*, 441 F.2d 1073, 1075 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971); or (3) claims an inability to recall the statements or its contents, *United States v. Insana*, 423 F.2d 1165, 1170 (2d Cir.), *cert. denied*, 400 U.S. 841 (1970); *United States ex rel. Thomas v. Cuyler*, 548 F.2d 461, 462-63 (3d Cir. 1977); *United States v. Rogers*, *supra*, 549 F.2d at 494-95; *United States v. Payne*, 492 F.2d 449, 451-54 (4th Cir.), *cert. denied*, 419 U.S. 876 (1974). Courts have held that a jury has a satisfactory basis to evaluate the truth of the prior statement so long as the declarant is willing to testify about the underlying facts.

denied, 396 U.S. 974 (1969); *United States ex rel. Smith v. Reincke*, 354 F.2d 418, 421 (2d Cir. 1965), *cert. denied*, 384 U.S. 993 (1966).

Finally, Hall's statements at his plea hearing carry greater "indicia of reliability" than did Loyd's confession in *Douglas*. *Dutton v. Evans*, *supra*. To be sure, declarations made against penal interest which also inculpate the accused must be treated with care for the declarant may be seeking to "curry favor with the authorities." *United States v. White*, *supra*, 553 F.2d at 313 n.4 (quoting Advisory Committee Note to F.R.E. 804(b)(4)). Hall's statements, however, were made in open court before a judge rather than "in the coercive atmosphere of [police] interrogation, as [in] *Douglas* . . ." 400 U.S. at 87. Moreover, unlike the confession in *Douglas*, the direct testimony of Donnelly and Epprecht and the strong circumstantial evidence of Rado's guilt corroborated Hall's statements, thus adding some additional assurance of reliability. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973); *United States v. White*, *supra*, 553 F.2d at 314.

In short, we conclude that Rado's right of confrontation was not violated by the state's attorney's reading from the transcript of Hall's guilty plea proceeding for the following reasons: 1. the recitation was neither "crucial" to the state's case against Rado nor "devastating" to his defense; 2. Hall was available for cross-examination at trial as to the veracity of his extrajudicial statements in light of the court's ruling that Hall had no Fifth Amendment privilege to assert, its willingness to impose sanctions for what it perceived to be an improper assertion of the privilege and Hall's eventual response to

questions when ordered to do so by the court; and 3. Hall's statements, though inculpatory of Rado, were reliable to the extent that they were corroborated by other evidence in the case, both direct and circumstantial, and were made in a non-coercive atmosphere.

B. *The Due Process Claim*

Rado's alternative basis for challenging his conviction is that the state's attorney's questioning of Hall with knowledge that Hall would refuse to answer constituted prosecutorial misconduct. Rado contends that the prosecutor's conduct throughout the course of the examination, but particularly at its conclusion, denied Rado's right to due process of law.

The leading case in this area is *Namet v. United States,* 373 U.S. 179 (1963), in which the Supreme Court, relying heavily upon Judge Learned Hand's decision in *United States v. Maloney,* 262 F.2d 535 (2d Cir. 1959), articulated two principles on which a witness' invocation of his Fifth Amendment privilege may constitute error: 1. "prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege"; and 2. when "in the circumstances of a given case, inferences from a witness's refusal to answer added critical weight to the prosecution's case in a forum not subject to cross-examination. . ." 373 U.S. at 186-87. In *Douglas v. Alabama, supra,* these principles were given constitutional significance and made applicable to the states. *See* 380 U.S. at 419-20 (citing *Namet* and *Maloney, supra*). In applying the *Namet* rule to particular cases, the courts have analyzed various factors, including the prosecutor's intent in calling the witness, the number of questions asked, their importance to the state's case, whether the prosecutor draws any inference in his closing argument from the witness' refusal to answer in his closing argument and whether the trial judge gives a curative instruction. *Moynahan v. Manson,* 419 F. Supp. 1139, 1149 (D. Conn. 1976), *aff'd,* 559 F.2d 1204 (2d Cir.), *cert. denied,* 434 U.S. 939 (1977).

We do not believe that the record before us can support a finding of prosecutorial misconduct based upon either of the *Namet* principles. It is undisputed that, prior to calling Hall to the stand, the state's attorney did not know that Hall would assert his privilege against self-incrimination. "Since the government has the obligation to present such relevant testimony as the witness may possess, it must in turn have a reasonable opportunity to test whether that testimony will be forthcoming, and if not, whether it can be compelled." *United States v. Mayes,* 512 F.2d 637, 649 (6th Cir.), *cert. denied,* 422 U.S. 1008 (1975). Moreover, the state's attorney apparently believed, as in *Namet,* that as a matter of law Hall had no Fifth Amendment privilege to invoke, reasoning that Hall's plea of guilty to the conspiracy charge nullified his right against self-incrimination.[7] The trial judge evidently shared this

7 It is apparent from the hearing held below that the state's attorney knew that as a matter of Connecticut law, the prosecution may generally vacate a nolle prosequi and reinstituted a prosecution without violating principles of double jeopardy. He also believed, however, that in the context of a plea bargain, nollied charges could not be reinstituted "so long as the plea bargain stood." (Appendix, at 154).

view and repeatedly directed Hall to respond and found him in contempt when he did not. Under the circumstances, we cannot find that the state's attorney's decision to press further and to ask Hall the final four questions concerning the actual perpetration of the robbery was a deliberate attempt by the state to capitalize on the witness' refusal to testify. While the state's attorney should not have withdrawn each of these questions without asking the court for its assistance in eliciting the desired testimony, we do not view this single lapse, when viewed in the context of a two-week trial, as a calculated ruse aimed at inducing the jury to draw improper inferences against Rado. *See Namet v. United States, supra,* 373 U.S. at 188-89.

Turning to the second prong of the *Namet* rule, we also cannot find that Hall's refusal to answer added "critical weight" to the state's case. This is not a case like *Douglas v. Alabama, supra, United States v. Maloney, supra* or *Robins v. Small,* 371 F.2d 793 (1st Cir.), *cert. denied,* 386 U.S. 1033 (1967) in which "a witness' refusal to testify is the only source or even the chief source of the inference that the witness engaged in criminal activity with the defendant." *Namet v. United States, supra,* 373 U.S. at 189. Both the testimony of Donnelly and Epprecht and the strong circumstantial evidence adduced at trial strongly implicated Rado in the planning of the robbery. Hall's claims of privilege were merely "cumulative support" for inferences already established through witnesses who were subject to full and effective cross-examination.[8] *See, e.g., Cota v.*

8 We also reject Rado's alternative contention that Hall's invocation of the privilege violated Rado's rights under the Confrontation Clause since we believe, for the reasons set forth in the text, that Hall's refusal to answer did not lend critical weight to the state's case. *See Douglas v. Alabama, supra.*

Eyman, 453 F.2d 691, 695 (9th Cir. 1971), *cert.* denied, 406 U.S. 949 (1972); *United States v. Roselli,* 432 F.2d 879, 903 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971); *Moynahan v. Manson, supra,* 419 F. Supp. at 1149. Rado does not claim that the state's attorney made any reference to Hall's refusal to testify in his closing argument to the jury. While the trial judge gave no curative instruction in this case, it does not appear that Rado's counsel asked the court to do so. In sum, analyzed under either of the theories set forth in *Namet,* we cannot find that Rado was denied a fundamentally fair trial.

CONCLUSION

Because we find no violation of Rado's constitutional rights of confrontation and due process, the judgment of the district court is reversed and the cause is remanded with instructions to deny the petition.

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APPENDIX B

Opinion of District Court

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DONALD A. RADO :

V. : CIVIL NO. H-77-125

STATE OF CONNECTICUT, ET AL:

MEMORANDUM OF DECISION

The petitioner, Donald Rado, seeks a writ of habeas corpus ordering his release from confinement by the state of Connecticut. In 1972, after a jury trial in Connecticut Superior Court, petitioner was convicted of the crimes of robbery in the first degree, burglary in the first degree, and conspiracy. The judgment of conviction was affirmed by the Connecticut Supreme Court. State v. Rado, 172 Conn. 74, 372 A.2d 159 (1976). He charges that the admission of certain evidence at that trial deprived him of his right to confront witnesses against him, and that prosecutorial misconduct at the trial caused a deprivation of liberty without due process of law, in contravention of the sixth and fourteenth amendments to the United States Constitution. This court has granted petitioner's motion for bond pending resolution of his habeas corpus petition. Rado v. Manson, 435 F.Supp. 349 (D. Conn. 1977). This decision is rendered after a full hearing on the merits.

I. THE FACTS

A. The Crime

The state charges that petitioner met with three other men at his home to plan the robbery of a neighbor's house. Though petitioner was not charged with participation in the actual robbery, it was alleged that he selected the victim, gave instructions to the robbers, and supplied them with walkie-talkies and a gun for use in committing the robbery.

The other three defendants pleaded guilty to charges arising from the robbery, and each of them testified at petitioner's trial. Two of the men, Sean Donnelly and Wayne Epprecht, gave full accounts of the robbery and of meetings with petitioner where it was allegedly planned. They disagreed, however, on certain details of the crime. In addition, both witnesses were successfully impeached at trial. Donnelly was shown to have given an inconsistent statement to the police, and to have been using narcotics regularly at the time of the crime. Epprecht, confronted with documents conflicting with his testimony, admitted that he had perjured himself on direct examination. Because the credibility of these witnesses was successfully attacked at trial, the testimony of the third defendant, Fred Hall, was critically important to the state's case against

petitioner. Petitioner's constitutional claims are based on prosecution tactics employed in the direct examination of Hall.

B. Hall's Plea Hearing

The original information filed against Hall charged him with robbery and burglary. Hall agreed to plead guilty to a charge of conspiracy in a substituted infomation, in exchange for the state's attorney's promises to enter a nolle prosequi on the substantive offenses charge and to recommend a sentence of two to four years. It was agreed that Hall could be subpoenaed by either side in petitioner's trial, that the jury would not be told that Hall had entered a guilty plea, and that the state's sentencing recommendation would be reduced if Hall cooperated in the prosecution of petitioner. Hall's attorney, Jacob D. Zeldes, also extracted a promise that the state's attorney, Francis McDonald, would not contest Hall's right to invoke the privilege against self-incrimination if Hall elected to invoke the privilege at petitioner's trial. When the plea bargain was entered, the state's attorney was not told that Hall would invoke the privilege at trial, but such a possibility was tacitly acknowledged by the promise to honor the privilege if it was claimed.

Hall's guilty plea was taken by Judge John A. Speziale of the superior court, the same judge who presided at petitioner's trial. Before the plea was taken, the judge held a chambers conference with Mr. Zeldes and Mr. McDonald. The attorneys informed Judge Speziale of their plea bargain, including the sentence which the

state's attorney had agreed to recommend. Judge Speziale was not informed that the state had agreed to honor a possible fifth amendment claim by Hall. The judge told the attorneys that if he was unable to agree to the sentence recommended by the state's attorney, he would allow Hall to withdraw his guilty plea.

On November 28, 1972, Hall entered his guilty plea before Judge Speziale to a charge of conspiracy. A recitation by Mr. McDonald set forth the alleged facts of the robbery, implicating petitioner, Donnelly and Epprecht as well as Hall. Hall was asked by the court if he had anything to add to Mr. McDonald's statement, and he answered, "No, sir." When asked if the facts set forth by Mr. McDonald were "substantially correct and accurate," he replied, "Yes, sir." No oath was administered to Hall at the plea hearing. The court accepted Hall's plea, the remaining counts were nolled, and the case was continued to January 5, 1973, for disposition.

C. Hall's Testimony at Petitioner's Trial

Hall was called to testify against petitioner on December 7, 1972. His attorney, Zeldes, was not present. Though the state's attorney knew that the witness might refuse to answer incriminating questions, he did not ask to examine him in the absence of the jury.

The witness freely answered the first questions put to him by the state's attorney, which concerned the location of his home and the manner by which he had come to know petitioner. When asked if he had eaten lunch with petitioner every day during the trial, he stated that he wished to reserve his right not to answer certain questions. Judge Speziale said that Hall could certainly answer this question, and Hall replied in the negative. He answered questions about the location of petitioner's home and his initial acquaintance with Wayne Epprecht in Florida, but refused to say when he had first seen Epprecht in Connecticut, on the ground that his answer might tend to incriminate him. The court ordered Hall to answer the question, and he did so.

The state's attorney continued his questioning in the presence of the jury. Hall gave a series of reluctant answers to questions about his car and its confiscation by the police while he was incarcerated. The court declared Hall to be a hostile witness, and the questioning continued. Hall answered several questions about a suitcase containing Epprecht's and Donnelly's clothing which had been found in his car. He refused to answer a question about how well he knew the petitioner, but did so when the court ordered him to answer. He then answered several questions about his social relationship with the petitioner, though his answers were increasingly evasive.

The state's attorney's questions drew closer to the facts of the alleged crime. Hall refused to state whether he had ever brought Donnelly and Epprecht to petitioner's house and at that point the judge excused the jury. He explained to Hall that because Hall had pleaded guilty to conspiracy, the court considered his fifth amendment claim "foundless." The court refused to hear argument from petitioner's counsel on the question of Hall's privilege.

When the jury returned, the witness again refused to answer the last question and asked for an opportunity to get in touch with his attorney. After twice being ordered to answer, Hall finally answered the question about bringing Donnelly and Epprecht to petitioner's house in the affirmative. The state's attorney then focused on a meeting at petitioner's home on July 3,1972, the date of the robbery. Hall refused to answer three of the state's attorney's questions about the meeting, but each time he was ordered to answer and did so.

Hall was next asked if he remembered planning the robbery at petitioner's house on July 3. He repeatedly refused to answer this question, even after the court had ordered him four times to do so.

Judge Speziale excused the jury again. He explained to Hall that he would be held in contempt if he persisted in refusing to answer. Hall asked if he could have his

attorney present. The judge said that he could have had his attorney present; but Hall explained that he had been in court for several days of trial waiting to testify, and that his attorney could not be present for the entire trial. Hall told the court that he was acting on his attorney's advice, that he had no fear of testifying, and that no one but his attorney had spoken to him about testifying. The state's attorney offered to withdraw his last question. The jury returned to the courtroom and was told that the question had been withdraw.

Instead of continuing to ask the witness questions about the alleged crime, the state's attorney proceeded as follows:

"BY MR. MC DONALD:

"Q Mr. Hall, do you remember being in Court here, in this courtroom here, on November 28, 1972?

"A Yes, I do.

"Q And I believe your attorney, Mr. Zeldes, was here with you; do you recall that?

"A Yes.

"Q Do you recall that the following occurred: --

[A defense objection was overruled.]

"Q Do you recall my saying in your presence:

"Yes, your Honor. On July 3rd, 1972, the home of a Mrs. Hyman, in the Bunker Hill section of Waterbury, was entered by Sean Donnelly and Wayne Epprecht. They were at the time armed with fire-arms. They had been driven to the scene by this accused in his own car'? That is referring to you.

"'Donnelly and Epprecht carried with them a bush, by means of which they gained entry in the home and attempted to commit the crimes of robbery and burglary in the first degree. Prior to driving to the home, this scheme, this plan to commit this crime had been discussed with the conspiractors Rado, Donnelly, Epprecht, and Hall. That is the factual recitation.'

"And the Court said: 'Frederick Hall, you heard the State's Attorney set forth the facts here at the request of the Court. Do you have anything to add to the state-ment as set forth by Mr. McDonald at this point?' And you recall that you answered: 'No, sir'; do you remember that?

"A Yes.

"Q Now, do you recall giving that answer to the Judge, that you had nothing to add to that recitation?

"A Yes.

"Q Was that a true recitation of what happened?

"THE WITNESS: If your Honor please, I would like to talk to you.

"THE COURT: You want to speak to the Court in the absence of the jury?

"THE WITNESS: Yes, I would.

"THE COURT: I am going to excuse you, ladies and gentlemen."

The judge held unreported conferences with the witness and then with counsel. The last question was read back, and the state's attor-ney withdrew it. The jury was called back and was told that the last question had been with-drawn. But the judge did not repeat the question to them.

The state's attorney then asked the witness whether he recalled his earlier answer to what occurred at the plea hearing, and continued with regard to that incident,

"Then the Court said: 'Are the facts set forth by Mr. McDonald substantially correct and accurate?'

"And you replied: 'Yes, sir.'

"Do you recall giving that answer to the Court?

"A Yes.

Hall repeated that he recalled what was said at the hearing, but was not asked again whether the answers he gave at the plea hearing were true. Nor was he asked whether the transcript of the plea hearing had refreshed his recollection of the events of July 3.

The state's attorney then explored the witness' possible bias in favor of petitioner. Hall said he could not remember how many times he had eaten lunch with petitioner during the trial. The state's attorney asked if Hall had a bad memory, and Hall started to state that he did not wish to answer. Before he could finish, the court excused the jury for a fourth time. Without hearing argument, the judge immediately held Hall in contempt.

After a recess, petitioner's attorney moved for a mistrial. The motion was denied, and the jury returned to the courtroom. The question about Hall's memory was not repeated. Instead, the state's attorney asked the following series of questions:

> "Q Mr. Hall, did you plan at Mr. Rado's home on the afternoon of July 3, 1971, with Epprecht and Donnelly, together with Mr. Rado, to rob Mrs. Hyman?
>
> "THE WITNESS: If your Honor, please, I refuse to answer the question on the grounds that it might tend to incriminate me.

"MR. MC DONALD: I won't press the question, your Honor.

"BY MR. MC DONALD:

"Q In your presence were firearms given to Epprecht and Donnelly at the home of Donald Rado?

"THE WITNESS: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.

"MR. MC DONALD: I won't press that question.

"BY MR. MC DONALD:

"Q Were the walkie-talkies given to these men or to Donnelly and to you by Mr. Rado to perpetrate this armed robbery against Mrs. Hyman on that day?

"THE WITNESS: If your Honor, please, I refuse to answer the question on the grounds that it might tend to incriminate me.

"BY MR. MC DONALD:

"Q Can you seen the home of Mrs. Hyman from the back porch of Mr. Rado's house?

"THE WITNESS: If you Honor, please, I refuse to answer the question on the grounds that it might tend to incriminate me."

The direct examination of Hall concluded at this point.

The cross-examination was primarily concerned with the state's attorney's efforts to obtain a statement from Hall against petitioner, and with Hall's explanation of how he came to be at petitioner's home with Epprecht and Donnelly. Hall testified that he had had a problem with his car on the morning of July 3, and that he had asked petitioner to help him by picking up his two friends at a motel. Petitioner brought Epprecht and Donnelly to Hall's house while Hall was working on his car, and after 15 or 20 minutes they proceeded to petitioner's house, where Hall said he picked them up late in the day. The witness continued to refuse to answer certain questions when he felt the answers might incriminate him.

In a short re-direct examination, the state's attorney explored Hall's reluctance to sign any statements about the crime and his account of the events of July 3. After the re-direct examination, the judge excused the jury for a fifth time. He asked the state's attorney if he cared to be heard regarding the finding of contempt against Hall. Mr. McDonald stated that he would not ask the court to press the contempt citation, particularly because he had withdrawn the question which had brought on the finding of contempt. Judge Speziale noted that

while the witness had not answered several questions, Mr. McDonald had not pressed him for answers. He then vacated the finding of contempt and released Hall from custody. The jury returned, and Hall was excused.

II. THE LAW

Petitioner raises two constitutional claims. First, he argues that because Hall claimed the privilege against self-incrimination, he could not be cross-examined concerning the facts of the alleged crime. Therefore the state's attorney's recitation from the transcript of Hall's plea hearing constituted evidence admitted in violation of petitioner's right to confront the witnesses against him. Second, he argues that portions of the direct examination of Hall, and the last four questions in particular, constituted prosecutorial misconduct and a denial of due process of law. This claim is made because the state's attorney had reason to know that Hall would refuse to answer substantive questions about the alleged crime, and sought to use the questions themselves

as persuasive evidence against Rado.[1/] These claims will be discussed in turn.

A. The Confrontation Clause Claim

1. The Rule of Douglas v. Alabama

With respect to the first claim, the leading case is Douglas v. Alabama, 380 U.S. 415 (1965). There an accomplice witness, one Loyd, claimed the privilege

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1/ The state's attorney's continued questioning of Hall after he claimed the privilege against self-incrimination may be characterized as a breach of the plea agreement reached between Hall and the state. Petitioner does not claim that his personal due process rights were affected by the state's attorney's failure to honor Hall's privilege as promised.

against cross-examination because he planned to appeal his conviction. On direct examination, he was asked a series of questions based on a confession he had given to police, and three police officers also testified about receiving the witness' statement. Loyd refused to answer any questions about the crime, or to acknowledge that he had made the statement. The Supreme Court held that the defendant had been denied his right to cross-examination under the Confrontation Clause. "Loyd could not be cross-examined on a statement imputed to but not admitted by him." 380 U.S. at 419. The Court recognized that while Loyd's confession was not admitted into evidence, the unanswered questions could have had a significant impact on the jury.

> "Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true."

Id. In a case very similar to Douglas, it was held that the prejudicial impact of such an inference cannot be cured by an instruction at the end of the trial, directing the jury to disregard unanswered questions. Robbins v.

Small, 371 F.2d 793, 795-6 (1st Cir.), cert. denied, 386 U.S. 1033 (1967).

In determining whether evidence of a hearsay statement violates the Confrontation Clause, "[t]he relevant factual inquiry is whether, under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extrajudicial declaration." United States v. Adams, 446 F.2d 681, 683 (9th Cir.) cert. denied, 404 U.S. 943 (1971). It is thus important to consider not only the extent to which Hall was "available" for cross-examination, but also the nature of the evidence that had been presented in connection with his hearsay statement.

Like the witness in Douglas, Hall refused to answer any questions about the robbery. However, he did admit that he had given the answers which the state's attorney recited from the transcript of his plea hearing. The answers themselves were not offered as evidence, and the respondents do not argue that they were admissible hearsay. Instead, they were purportedly mentioned in order to refresh Hall's recollection, and thus to enable him to testify from a present recollection regarding the events of July 3. Yet after the recitation from the plea hearing transcript, the state's attorney did not press Hall to answer any substantive questions about those events, or even to state whether his previous answers at the plea hearing had been truthful.

After Hall refused to answer whether the statements which he acknowledged having made were true, the state's attorney withdrew that question.

When the direct examination had been concluded, the state had not introduced any positive evidence through Hall that Rado had plotted or committed the robbery. It was admitted that Hall had given certain answers about the crime, but there was no evidence before the jury that those answers were true.2/ There are thus two reasons why petitioner could not cross-examine Hall regarding the facts of his alleged crime. First, those facts were not placed in evidence during the direct examination. Second, Hall had refused to answer any questions about the crime itself. The state's attorney's questions created a situation in which the jury might infer, as in Douglas, that Hall's prior statements were true; yet because Hall refused to answer substantive questions, it had no "satisfactory basis" for evaluating the truth of those state-

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2/ The conclusion of the Connecticut Supreme Court that Hall had affirmed that the statements "were his and were true ...," State v. Rado, supra, 172 Conn. at 80, 372 A.2d at 162, is simply not supported by the trial record. Rado v. Manson, supra, 435 F.Supp. at 351 n.2.

ments.3/ Therefore, the conclusion reached in Douglas seems equally applicable to this case, even though the witness acknowledged that he had made the hearsay statements.

2. Limitations of the Rule

The respondents rely on several cases which have distinguished Douglas v. Alabama or limited the scope of its holding. Most of these cases, however, did not involve witnesses who refused to testify on fifth amendment grounds. In Calfornia v. Green, 399 U.S 149 (1970), the witness claimed that he could not remember the events to which he had testified at a preliminary hearing. The Court held that the claimed loss of memory did not make the witness

3/ In Douglas, three law enforcement officers who testified that they had received Loyd's confession were available for cross-examination. The court pointed out that cross-examination regarding the issue of whether Loyd had made the confession "could not substitute for cross-examination of Loyd to test the truth of the statement itself. Motes v. United States, 178 U.S. 458 [1900]; cf., Kirby v. United States, 174 U.S. 47 [1899]." 380 U.S. at 420. Here the declarant himself could be cross-examined regarding whether he had made the statements, but not regarding their truth.

unavailable for "full and effective cross-examination," 399 U.S. at 158, and specifically distinguished Douglas because there the witness had "refused to testify on self-incrimination grounds," id. at 163. The Second Circuit held in United States v. Insana, 423 F.2d 1165 (2d Cir.), cert. denied, 400 U.S. 841 (1970), that a witness' prior grand jury testimony could be used to impeach his asserted lack of memory at trial. Other courts have reached similar conclusions regarding witnesses whose memories failed at trial. See, e.g., United States ex rel. Thomas v. Cuyler, 548 F.2d 460 (3d Cir. 1977); United States v. Payne, 492 F.2d 449 (4th Cir.), cert. denied, 419 U.S. 876 (1974). However, our circuit has refused to apply the Insana holding to a witness who refused to testify on the grounds of privilege. United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971).

In Dutton v. Evans, 400 U.S. 74 (1970), a witness testified regarding an out-of-court statement by an accomplice declarant who did not appear at trial. The Court found no violation of the Confrontation Clause because the veracity of the out-of-court statements was thought, by the Court, to be otherwise well-established by the evidence. Id. at 88-89.

Evidence of a co-defendant's out-of-court statement was admitted in Nelson v. O'Neill, 402 U.S. 622 (1971). The co-defendant took the stand, waiving his

privilege against self-incrimination, and denied making the statement. The Court held that there was no Confrontation Cluase violation, because the witness could be, and was, cross-examined regarding the statement even though he had disaffirmed it. Id. at 627-28. The witness in Nelson v. O'Neill, unlike Hall, testified fully regarding the charges against him and the defendant.

In United States ex rel. Smith v. Reincke, 354 F.2d 418 (2d Cir. 1965), cert. denied, 384 U.S. 993 (1966), an accomplice-witness who had previously pleaded guilty and who refused to answer certain questions about his alleged crime, was confronted with a confession that he had signed. He said that he had signed the confession under coercion and that it was false. Unlike the witness in Nelson v. O'Neill, the witness in Reincke did, like Hall, assert his fifth amendment rights. However, in contrast to the present case, the defendant in Reincke did not lose his confrontation rights in spite of the fifth amendment privilege. Although the defendant did not do so, 4/ he could have cross-examined the witness regarding the circumstances of the claimed coercion which allegedly compelled the confession, thus giving the jury a basis for evaluating the truth of the out-of-court statement. Id. at 420-421. In the case at bar, the veracity of Hall's out-of-

4/ Because the defendant did not avail himself of this opportunity to cross-examine, the court held he could not later claim a violation of the Confrontation Clause.

court statement was not independently put in issue for the jury in his direct examination. From the outset, Hall refused to answer any question regarding the truth of those statements, thus blocking cross-examination.

In United States v. Rogers, 549 F.2d 490 (8th Cir. 1976), cert. denied, 431 U.S. 981 (1977), an accomplice-witness admitted that he had pleaded guilty to robbery charges and acknowledged that he had given a statement to a government agent, but said that he could not remember the facts of the crime. At the suggesion of defense counsel, he was advised of his fifth amendment rights. He then refused to answer any further questions, and the government introduced independent evidence of his confession. The Eighth Circuit held that the jury had an adequate opportunity to evaluate the truth of the out-of-court statement and, thus, within the terms of Dutton v. Evans, supra, 400 U.S. 74, there was no Confrontation Clause violation. Id. at 500.

Rogers may be distinguished from the case at bar on several grounds. The witness did not claim the privilege until after admitting his own participation in the crime. Id. at 501. The privilege was claimed only at the suggestion of the defendant's attorney. Id. at 494. There was other, overwhelming evidence of guilt, so that the hearsay statement could not have had a critical impact on the customs of the trial. Id. at 501-502. Finally,

the jury was instructed before it heard the hearsay that it was only to be considered to impeach the witness' actual testimony. Id. at 497, 502. In the case at bar, the subject of whether Hall's prior statements were true was not explored in his direct examination, and Hall refused to answer any questions regarding the substance of those answers. Despite the clear hearsay character of that statement, no limitation whatsoever was put upon its use.

The witness in United States v. Klein, 488 F.2d 481 (2d Cir. 1973), cert. denied, 419 U.S. 1091 (1974), claimed a loss of memory on the stand. When asked about her prior testimony before a grand jury, she acknowledged giving the testimony but did not affirm its truth. Without specifically discussing Douglas v. Alabama, the Second Circuit found no error in allowing the prosecutor to read from the grand jury transcript. Not only was the grand jury testimony "almost inconsequential" to the case, id. at 483, but the witness' acknowledgement of the testimony was tantamount to admitting its truth:

> "If Mrs. Clow had said explicitly that her grand jury testimony was the truth, this principle [that when a witness 'affirms the truth of a prior statement, the earlier statement is to be considered "not only as bearing on the credibility of the witness but as affirmative evidence",' United States v. Borrelli, 336 F.2d 376, 390-391 (2d Cir. 1964), cert. denied,

> 379 U.S. 960 (1965), quoting from Stewart v. Baltimore & Ohio R.R., 137 F.2d 527, 529 (2d Cir. 1943)] would sustain the judge's ruling. Since she had sworn to tell the grand jury the truth and in no way suggested at trial that she had disregarded that oath, her admission that the transcript correctly reflected what she had said is so close to the hypothetical that a distinction would be irrational."

Id.

The Klein case may implicitly recognize an exception to Douglas allowing the admission of hearsay where the declarant acknowledges the out-of-court statement and the statement itself was given under oath. Several other cases that have distinguished Douglas have relied in part on the inherent reliability of the hearsay statement. See Dutton v. Evans, supra, 399 U.S. at 165 (dictum); United States v. Rogers, supra, 492 F.2d at 452. Respondents seek to analogize these cases to the instant situation by arguing that Hall's responses at his plea hearing were inherently reliable because "they were made in ajudicial context and were obviously against the declarant's interest."

3. Reliability of Plea Hearing Statements

Even it it is assumed that Douglas does not apply to inherently reliable hearsay, the unsworn statements made by a defendant at the hearing where he pleads guilty pursuant to a plea bargain cannot, realistically, be regarded as inherently reliable. Despite

the safeguards of our system which are designed to assure that no innocent person is ever convicted of a crime, innocent persons are frequently persuaded to plead guilty. Sometimes this occurs because defendants are not aware whether their specific acts have fulfilled the elements of the crime of which they are charged. See A. Rosett & D. Cressey, Justice By Consent: Plea Bargains in the American Courthouse 26-27 (1976). A guilty plea usually reduces the uncertainty faced by a defendant, by eliminating the risk of a maximum sentence. See Note, Plea Bargaining and the Transformation of the Process, 90 Harv. L. Rev. 564, 576 (1977). The grading of offenses and the usual reduction of charges also served "to encourage defendants to buy mitigation with a guilty plea." A. Rosett & D. Cressey, supra, at 29. As a practical matter, a defendant's interests are frequently well served by a guilty plea; and it is unfair to characterize statements made in connection with a plea as "obviously against the declarant's interest." These considerations have led some commentators to conclude that "[m]any guilty pleas submitted in American courts are not free acts of the accused; they are gained by psychological coercion through threat of severe punishment." Id.

> "The practice of exchanging sentencing concessions for guilty pleas creates an incentive for defendants to plead guilty whenever there is significant risk of conviction at trial. The greater the concession that is offered, the smaller the risk of conviction that a defendant will be willing to accept, and thus the greater the incentive to plead guilty that the defendant may have."

Note, supra, 90 Harv. L. Rev. at 573-74 (footnotes omitted). For defendants with prior convictions, the perceived risk of conviction is greater and so is the incentive to plead guilty. 5/

5/ "In reality some defendant who regularly give up their rights in favor of pleading guilty by negotiation are indeed innocent .... A great many of these defendants are poor, many illiterate or semi-literate who have spent every part of their lives living on the fringes of the law .... They have served time, they have been jail-educated, and they are known on sight by every police officer in the areas they frequent. It is probably true that this defendant has been arrested on less than ten percent of the offenses that he has actually committed, but on the particular offenses for which he had been charged, he may be innocent.

The colloguy between judge and defendant is indeed guilty of the crime to which he pleads. "This remedy is insufficient, though, because defense counsel might advise their clients to admit involvement in the crime in order not to jeopardize the bargain that has already been struck." Note, supra, 90 Harv. L. Rev. at 574-75. When the defendant knows that certain answers must be given to uphold his bargain with the prosecutor, the inquiry into the factual basis for the pleas becomes a "ritual of questions by the judge and answers by the accused ...." A. Rosett & D. Cressey, supra, at 26. Even if a defendant is guilty, he may respond with approval to an inaccurate statement by the prosecutor of the facts and circumstances of his crime, because he

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5/ continued

> He knows that he has little chance in court because he has seen the process fail his peers."

Thomas, Plea Bargaining: The Clash Between Theory and Practice, 28 Loyola L. Rev. 303, 305 (1974).

knows that his hearing must go smoothly if he is to obtain the reduced charge and sentence for which he has bargained.

The recognition that guilty pleas are frequently unreliable is built into our system of criminal justice. Guilty pleas are often withdrawn with a court's permission for reasons that have nothing to do with guilty or innocent. See Kercheval v. United States, 274 U.S. 220, 224 (1927). Once a guilty plea has been withdrawn, evidence of the plea is inadmissible in any subsequent action, criminal or civil. United States v. Gallington, 488 F.2d 637, 640 (8th Cir. 1973), cert.denied, 416 U.S. 907 (1974); United States v. Robinson, 459 F.2d 1164, 1169 (D.C. Cir. 1972) (dictum). The fact that one person has pleaded guilty to a crime may not generally be used as evidence of another person's guilty, Gerberding v. United States, 471 F.2d 55, 60 (8th Cir. 1973); United States v. Baete, 414 F.2d 782, 783 (5th Cir. 1969) (dictum), though it may be introduced for impeachment or other special purposes. United States v. Wiesle, 542 F.2d 61, 62 (8th Cir. 1976). Cf., Bruton v. United States, 391 U.S. 123 (1968) (evidence of extra-judicial confession by co-defendant).

The Federal Rules of Criminal Procedure also implicitly recognize that statements made in connection with a guilty plea may be unreliable. They provide that when a guilty plea

has been withdrawn, statements made in connection with that plea are inadmissible against the defendant except in a prosecution for perjury or false statement, and then only if they were made under oath. Fed. R. Crim. P. 11(e)(6).[6/] The same rule has been applied to other incrimination statements made by a defendant after entry of a guilty plea and prior to its withdrawal. United States v. Albano, 414 F.Supp. 67 (S.D.N.Y. 1976).

In view of these considerations, the fact that certain statements were made by a defendant about his co-defen-

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6/ The Rules provides:

"(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere to the crime charged or any other crime, or of statements made in connection with, or relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty,

dant in connection with a guilty plea does not afford a basis for concluding that the statements must necessarily have been true. Hall's unsworn answers at the plea hearing were not intrinsically more reliable than the confession introduced in Douglas.

4. Conclusion

The respondents would also distinguish Douglas on the ground that Hall's claim to a fifth amendment privilege was invalid. However, it is by no

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6/ continued

later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel."

means clear that the trial judge ruled correctly on Hall's refusal to answer incriminating questions.7/ But even if

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7/ Hall had pleaded guilty to the crime of conspiracy, and two other pending charged had been nolled. Under Connecticut law, however, a nolle prosequi does not bar a subsequent prosecution for the same offense. State v. Garvey, 42 Conn. 232 (1875); State v. Benham, 7 Conn. 414, 418 (1829) (dictum). "Nolle prosequi is nothing but a declaration of the prosecuting officer that he will not prosecute the suit further at that time. State v. Kopelow, 126 Me. 384." State v. Ackerman, 27 Con.. Supp. 209, 211, 234 A.2d 120, 121 (Super. Ct. Tolland County 1967). Hall thus remained exposed to possible charges of burglary and robbery, and it would appear that the privilege against self-incrimination applied to any answer that could be used to support these charged.

In addition, Judge Speziale had indicated that he would allow Hall to withdraw his guilty plea if the judge could not approve the sentence recommended by the state's attorney. If that had occurred, Hall would have been exposed to possible trial on the conspiracy charge as well.

But even if Hall had no valid privilege, that would not affect petitioner's present claim. The Douglas opinion indicates clearly that the defendant's right of confrontation does not depend upon whether the witness acted within his rights

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7/ continued

The general rule is that a witness cannot claim the privilege with respect to a crime of which he has been convicted, United States v. Romero, 249 F.2d 371, 375 (2d Cir. 1957), or to which he has pleaded guilty, United States v. Sanchez, 459 F.2d 100, 102 (2d Cir.) cert. denied, 409 U.S. 864 (1972). This rule applies if no related charges are pending against the witness, and no additional charges can reasonabley be anticipated. United States v. Hodge & Zweig, 548 F.2d 1347, 1352 (9th Cir. 1977).

However, the possibility of additionally related charges may revive the privilege. In United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973), a witness-codefendant had pleaded guilty to a charge of distributing cocaine. His fifth amendment claim was upheld because, while his "conviction, of course, removed any claim of privilege based upon liability for that offense, see, e.g., United States v. Romero, [supra,] 249 F.2d 371, 375 [the witness] remained open to a state or federal conspiracy prosecution." Id. at 1209. The fact

in refusing to answer:

> "We need not decide whether Loyd properly invoked the privilege in light of his conviction. It is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that Loyd's refusal

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7/ continued
that further prosecution was unlikely, that that the federal prosecutor had denied any intention to charge the witness with conspiracy, did not negate his privilege. Id., n. 2. See United States v. Franz, 469 F.2d 76 (9th Cir. 1972); United States v. Ward, 314 F.Supp. 261, 263-66 (E.D.La. 1970).

A similar exception applies where a witness has been convicted and sentenced, but a motion to vacate sentence is pending, Ottomano v. United States, 468 F.2d 269, 274 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973), or where his conviction is still subject to appeal, Prenteice v. Hsu, 280 F.Supp. 384, 388 (S.D.N.Y. 1968). The present situation, in which Hall's guilty plea was still subject to withdrawal, can readily be analogized to these cases.

> to answer was procured by the petitioner, see Motes v. United States, supra, at 471; on this record it appears that Loyd was acting entirely in his own interests in doing so."

Douglas v. Alabama, supra, 380 U.S. at 420. Similarly, no claim is made here that Hall's silence was induced by petitioner or his attorney. As Hall stated at the trial, he was acting in his own interest and on the advice of his own counsel.

7/ continued

It should also be noted that Hall did not waive his privilege by speaking on the record at his plea hearing. Waiver of the privilege in one proceeding does not affect a witness' rights in another, independent proceeding. Ottomano v. United States, supra, 468 F.2d at 273; United States v. Miranti, 253 F.2d 135, 140 (2d Cir. 1958).

The respondents argue finally that Hall was not actually unavailable for cross-examination, because when he was ordered to answer a question by the trial judge, he eventually gave an answer. Of the 14 questions which Hall refused to answer, or to which he objected in some form, he gave answers to the first seven. However, none of those seven questions directly concerned the facts of the alleged crime. Hall never answered any question about the crime itself, even though he was ordered several times to do so. This is because all such questions were explicitly or implicitly withdrawn after the judge had ordered Hall to answer three times. The last four were withdrawn immediately after Hall's initial refusal to answer.

It appears that Hall was unwilling to answer any question which directly concerned the conspiracy and robbery. He was held in contempt for this very reason. If respondents are correct, and answers to those questions could be obtained by simply ordering Hall to answer, it may be asked why the state's attorney repeatedly withdrew his questions instead of pressing for answers. It is obvious that the state's attorney did not believe that Hall could be prodded to answer such direct questions. I conclude that the witness was unavailable for cross-examination regarding the truth of his prior statements,

and therefore that the prosecutor's questions based on the plea hearing violated petitioner's right of confrontation under the sixth and fourteenth amendments.

B. The Due Process Claim

Petitioner's second claim is that the final questions in the direct examination of Hall violated due process because they were asked with the knowledge that no answer would be given and for the purpose of creating inferences in the minds of the jury as to what Hall's answers would have been.

The significance of such inferences was pointed out by Judge Learned Hand:

> "When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused .... Such refusals [to answer] have been uniformly held not to be a permissible basis for inferring what would have been the answer, although logically they are very persuasive .... [I]t is clear, not only that the presumed answer has not the sanction of an oath, but--what is even more important--that the accused cannot cross-examine. If they once do get before the jury, there arises, as we have said, a strong probability that they will be taken as evidentiary."

United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959).

Basic fairness requires that a prosecutor discontinue his leading questions when it becomes apparent that the witness will not answer them. Robbins v. Small, supra, 371 F.2d 793, 795. As Judge Hand noted in the paragraph just quoted, "If the prosecution knows when it puts the questions that [the witness] will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind." 262 F.2d 537.

> "The central case in this area is, of course, Namet v. United States, 373 U.S. 179 (1963), whose principle was raised to constitutional level and made applicable to state proceedings in Douglas v. Alabama [supra, 380 U.S. 415]. Under the rule set out in those cases, the practice of compelling a witness to invoke his fifth amendment privilege can require reversal in two circumstances: (1) when it amounts to prosecutorial misconduct, i.e., when a prosecutor knowingly attempts to influence the jury through the impermissible inference, and thus deprives the defendant of his right to due process; or (2) when it allows the prosecution to add critical weight to its case by eliciting

> evidence of inferences in a manner which does not allow the defendant to subject the witness to cross-examination, and thus deprives him of his right to confrontation guaranteed by the sixth amendment."

Moynahan v. Manson, 419 F.Supp. 1139, 1148-49 (D.Conn. 1976), aff'd, 559 F.2d 1204 (2d Cir.), cert. denied, 434 U.S. 939 (1977) (footnote omitted). The standards discussed in Namet are often difficult to apply, and no clear guidelines appears from the decided cases. Id. at 1149.

> "Among the factors which courts take into account appear to be: the prosecutor's intent in calling the witness, the number of questions which he asks, the importance of the questions the testimony in the closing argument, and whether or not the judge gives a curative instruction."

Id. (footnote omitted).

When Hall was called to testify, it was uncertain whether or not he would claim the privilegeagainst self-incrimination that he would not answer any question which directly concerned his alleged crimes. While the state's attorney could not know what to expect at the outset, it was clear once the jury had been excused for the fourth time that the most probing questions would not be answered. Focusing on the series of questions asked when the jury returned, it is clear that the state's attorney expected no answers. He withdrew

the questions even before the judge could order Hall to answer them. Since no answers were expected, the only plausible reason for asking the questions was to have the jury hear Hall's refusals to answer. The impact of his refusals was exacerbated by the length of the interrogation and the necessity to excuse the jury five times. As Judge Hand explained, an impermissible inference arose from Hall's refusals to answer, and the state's attorney was charged with notice to that effect. "The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle or gross improprieties." Donnelly v. DeChristoforo, 416 U.S. 637, 650-651 (1974) (Stewart, J., concurring). Under the first criterion enunciated in Namet v. United States, supra, 373 U.S. at 186, I find that the final questions by the state's attorney constituted prosecutorial misconduct and a denial of due process.

The state's attorney asked seven questions that were never answered. The importarce of Hall's testimony to the case against petitioner has already been discussed in Part I, supra. No curative instruction was given. No transcript of the closing argument has been filed in this case, so it is not known whether the state's attorney referred to Hall's refusal to answer. But the prejudicial impact of the unanswered questions, especially in combination with the reference to Hall's prior hearsay statements, is clear. Referring to the second Namet

criterion, the inferences from Hall's refusals to answer "added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." Id. at 187.

Unless the state shall elect to retry the petitioner within 60 days of the entry of judgment in this action, a writ of habeas corpus shall be issued, and he shall be released from custody. The foregoing shall constitute the court's findings of fact and conclusions of law, as required by Rule 52(a), Fed. R. Civ. P.

SO ORDERED.

Dated at Hartford, Connecticut, this 24th day of October, 1978.

/s/ M. JOSEPH BLUMENFELD
M. JOSEPH BLUMENFELD
UNITED STATES DISTRICT
JUDGE

APPENDIX C

Opinion of Connecticut
Supreme Court

STATE OF CONNECTICUT

V.

DONALD RADO

Information charging the defendant with the crimes of robbery in the first degree, burglary in the first degree, and conspiracy, brought to the Superior Court for the judicial district of Waterbury and tried to the jury before *Speziale, J.*; verdict and judgment of guilty and appeal by the defendant. *No error.*

The appellant filed a motion for reargument which was denied.

Richard D. Casella, for the appellant (defendant).

Walter H. Scanlon, assistant state's attorney, with whom was *Francis M. McDonald, Jr.*, state's attorney, for the appellee (state).

MacDonald, J. On a trial to a jury, the defendant was found guilty of one count of robbery in the first degree in violation of § 53a-134 of the General Statutes, one count of burglary in the first degree in violation of § 53a-101 and one count of conspiracy in violation of § 53a-48. On his appeal to this court, the defendant raises six issues, assigning error to several rulings on evidence made during the trial, the denial of his motion for a mistrial with respect to the testimony of one of the state's witnesses and

the denial of his motion to set aside the verdict and order a new trial because of a claimed improper remark by the state's attorney during his summation. In order adequately to review the claimed errors, it is necessary to consider only the following facts as to which the state produced evidence and as set forth in the statements of facts printed in the briefs.

On the evening of July 2, 1972, Sean T. Donnelly, Wayne J. Eppreeht and Fred J. Hall went to the home of the defendant, Donald A. Rado, and discussed a proposed robbery of a jeweler's widow, Theresa A. Hyman, whose home was directly opposite and clearly visible from the back porch of the Rado home. Rado pointed out the Hyman house and stated that it could contain money and jewelry. The next day, July 3, Hall, Donnelly and Eppreeht drove in Hall's car to Rado's home. Late in the afternoon, Donnelly went to the nearby home of Rado's neighbor, John Spinella, to help with some carpentry. After Donnelly's return, the four men met in the basement of Rado's home, where Rado gave Eppreeht a .32 caliber pistol and Hall gave Donnelly a .38 caliber pistol. Rado instructed Donnelly and Eppreeht that they were to use the pistols to rob the Hyman home, gave Donnelly a walkie-talkie portable transceiver to carry with him during the robbery and agreed to remain at his home during the robbery "in the event anything happened."

Hall drove Donnelly and Eppreeht to the Hyman home and remained in his car while Donnelly and Eppreeht forced their way into the house, struck and bound Theresa Hyman and ransacked the house, taking a number of items of jewelry. When surprised by a neighbor, Donnelly and Eppreeht fled, dropping Rado's walkie-talkie in their haste, were

picked up by Hall in his car, and returned to Rado's home, where they changed their clothes and gave the pistols back to Rado. The ownership of the walkie-talkie dropped by Donnelly was traced to Rado and, during a search authorized by a warrant, the pistol used by Eppreeht during the robbery was found in the Rado home.

Three of the errors claimed by the defendant pertain to rulings made by the court with respect to the testimony of Hall who, after pleading guilty to the crime of conspiracy to commit the robbery involved here, was called as a state's witness, the remaining charges against him of burglary and robbery having been nolled. Claiming error in the court's permitting the state even to produce Hall as a witness when the state "knew or should have known that he would refuse to testify," the defendant cites *State* v. *Moynahan*, 164 Conn. 560, 586, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 where we state: "A prosecutor or state's attorney, in a criminal case, may not call anyone who, in any capacity, has become so involved in the defendant's criminal activities *as to be liable to prosecution* for the same offense or for another offense growing out of the transaction from which the defendant's alleged offenses arise, *with a design or purpose of extracting a claim of privilege against self-incrimination.*" (Emphasis added.) The inapplicability of this language to the defendant's claim is clearly indicated by the emphasized words. Hall, an accomplice of the defendant, already had pleaded guilty to his participation in the transaction from which the defendant's offenses arose and, accordingly, unlike the witness in *Moynahan*, no longer had the privilege against self-incrimination since he no longer could be incriminated by his testimony con-

cerning the crime under consideration. "It is well established that once a witness has been convicted for the transactions in question, he is no longer able to claim the privilege of the Fifth Amendment and may be compelled to testify." *United States* v. *Romero*, 249 F.2d 371, 375 (2d Cir.); *Reina* v. *United States*, 364 U.S. 507, 513, 81 S. Ct. 260, 5 L. Ed. 2d 249; *Brown* v. *Walker*, 161 U.S. 591, 597–600, 16 S. Ct. 644, 40 L. Ed. 819.

Returning to the words emphasized in the above quotation from our opinion in *Moynahan*, there was no showing or suggestion here that the state knew or should have known in advance of the trial that Hall would attempt to invoke the privilege. See *Namet* v. *United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278, which held that the trial court's permitting the prosecution to ask witnesses incriminating questions concerning their relationship with the defendant with the knowledge that the witnesses would invoke the privilege against self-incrimination did not constitute reversible error, the court stating (p. 189): "We cannot find that these few lapses, when viewed in the context of the entire trial, amounted to planned or deliberate attempts by the Government to make capital out of witnesses' refusals to testify." As a matter of fact, the state might well have been in derogation of its duties if it had not called Hall as a witness for, as stated by the court in *United States* v. *Romero*, supra, 375, "[i]n view of the fact that . . . [Hall] had intimate knowledge of the transactions upon which the prosecution was based, the government ran the risk of argument to the jury by defense counsel that the government's failure to call an available witness raised the inference that his testimony would be unfavorable to the government's case." Clearly, it

was not error, under the circumstances, for the court to permit the state's attorney to produce Hall as its witness nor, for the reasons given and under the authorities cited above, was it error, as claimed by the defendant, for the court to order Hall to testify despite his repeated invocation of the fifth amendment.

The defendant also claims that the court erred in permitting the state's attorney to interrogate the witness Hall "from a document not in evidence and which was clearly hearsay, under the guise of refreshing his recollection." The document in question was the stenographic transcript of statements made in open court by Hall a few weeks prior to the trial in the course of his pleading guilty to the offense of conspiracy to commit the robbery and burglary in question. His determination not to testify as to events immediately preceding the commission of this crime was made apparent by his repeated statements that he could not remember them. The use of a transcript of his prior statements to refresh his recollection was entirely proper, as were the questions asked by the state's attorney in cross-examination of a witness who specifically had been found by the court to be hostile. "Any memorandum which can in fact stimulate the present recollection may be used, whether made by the witness or not, whether it be the original or a copy, or whether made at the time of the events testified to or not. In the case of the past recollection the memorandum may be laid in evidence as a part of the direct examination, while in the case of the present recollection it may not, since it is the recollection, not the memorandum, which is the evidence." *Neff* v. *Neff*, 96 Conn. 273, 278–79, 114 A. 126.

The defendant claims support for his position in *Douglas* v. *Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, where the court held that it was a violation of the defendant's constitutional right to permit the state's attorney to use a confession signed by an accomplice to refresh the accomplice's recollection when he was called as a state's witness and relied on his privilege to refuse to answer. In pointing out that effective confrontation by cross-examination of the witness was made impossible by his refusal to answer, the court in *Douglas*, quoting *Namet*, stated (p. 420): "The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.'" Here, confrontation of Hall was made possible by his affirmation of the questions propounded to him by the state's attorney, specifically affirming that the prior statements he had made in open court, as recorded in the transcript, were his and were true and concerning which the defendant could and, in fact, did cross-examine him at length. The court did not err in permitting the state's attorney to cross-examine Hall from the transcript of his statements made in open court at a prior hearing.

The defendant, in his statement of issues and argument to this court, claims error in allowing testimony from Epprecht and Hall "concerning evidence of another crime, said evidence being irrelevant and hearsay." The entire thrust of his argument on that issue before this court is addressed to the prejudicial nature of evidence of other crimes involving the accused, but the record discloses that this argument was not made to the trial

court. The only exception taken during the introduction of the testimony under consideration was to the court's overruling an objection that evidence as to a statement made by the defendant was hearsay. Since the statement in question was not a confession or admission, the ruling was correct, and the state properly claimed that the grounds for objection now urged on appeal differ from those stated during the trial. "To assign error in the court's evidential ruling on the basis of objections never raised at the trial amounts to trial by ambuscade of the trial judge. . . . 'This court is not bound to consider claims of law not made at the trial.'" *State* v. *Johnson*, 166 Conn. 439, 444–45, 352 A.2d 294. Inasmuch as the record discloses that the other crime mentioned in the testimony admitted did not involve or concern the defendant, no prejudice to the defendant can be claimed to constitute "exceptional circumstances," as discussed in *State* v. *Evans*, 165 Conn. 61, 69–71, 327 A.2d 576, to require our consideration of the ground for objection now urged for the first time.

The claimed error in denying the defendant's motion for a mistrial with respect to the testimony of the witness John Spinella came about when Spinella, a neighbor of the defendant, became ill while testifying for the state and was unable to return to court for cross-examination by the defendant. His testimony was merely corroborative of that of Donnelly wherein Donnelly stated that on the afternoon of July 3, 1972, while he was at Rado's home, he and Rado had gone to Spinella's home and assisted him with some carpentry. When Spinella was unable to return to court, his son, John Spinella, Jr., was called by the state and gave substantially the same testimony as had his father,

with respect to which the defendant, although given the opportunity, failed to cross-examine. Under the circumstances, the state moved to strike the testimony of the elder Spinella as unnecessary and the court, over objection of the defendant, granted that motion and subsequently denied the defendant's motion for a mistrial based upon the grounds that his testimony could give rise to damaging inferences. The court, however, did instruct the jury to disregard the testimony of the elder Spinella in a charge set forth in the footnote.[1] The decision to strike the testimony of the elder Spinella, accompanied by the cautionary instruction to the jury as an alternative to declaring a mistrial, was within the sound discretion of the trial court, especially where the son had testified to the same relatively unimportant facts as had his father and was not cross-examined by the defendant.

The final assignment of error pertains to the denial of the defendant's motion to set aside the verdict and order a new trial because of an allegedly improper remark made by the state's attorney during his summation to the jury and which, it is claimed by the defendant, referred to his failure to testify.

The remark to which objection was made was a statement that the defendant was "hiding behind

[Footnotes set forth at the conclusion of this opinion.]

the skirts of his wife and aging mother-in-law," and the entire record of the claimed improper remark and the action taken by defense counsel at the time appears in the footnote.[2] It should be noted that, contrary to the defendant's claim in his brief that "a Motion for Mistrial was made because of this comment and was denied" and at variance with his statement of the issue presented as the denial of his motion for a mistrial, no such motion actually was made or denied nor was the objection so stated that the trial court had before it the exact basis of the defendant's objection. The first specific mention of this issue in the record was in an "Amendment to Motion to Set Aside the Verdict and Order New Trial for the Defendant" filed approximately one month after the trial. In view of the fact, however, that the defendant has claimed a violation of a constitutional right, namely, his privilege against self-incrimination guaranteed by the fifth amendment to the United States constitution and article first, § 8, of the Connecticut constitution, and since he did make timely objection and noted an exception to the court's action in permitting the state's attorney to continue without further action at the time, we will consider this claim as being properly before the court.

Section 54-84 of the General Statutes provides, in relevant part: "The neglect or refusal of an accused party to testify shall not be commented upon to the court or jury." In addition to this statutory protection it is, of course, undisputed that the defend-

[Footnotes set forth at the conclusion of this opinion.]

ant is protected against any adverse comments concerning his failure to testify by such decisions of the United States Supreme Court as *Griffin* v. *California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, rehearing denied, 381 U.S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730, and *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, rehearing denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241; see *State* v. *Branham*, 171 Conn. 12, 368 A.2d 63. An examination of the United States Supreme Court decisions cited by the defendant including *Griffin* and *Chapman*, however, discloses that the prosecutor's comments there under consideration were unmistakably and even flagrantly directed toward the failure of the defendant to testify.[3] In the case before us, by contrast, no direct reference was made to the failure of the defendant to testify and any inference of such reference, under the circumstances of this case, can be found only by rather strained interpretation. In the concluding paragraph of his brief, the defendant states: "That such words were a comment on the defendant's failure to testify is evident because his two main witnesses were his wife and aging mother-in-law taking up most of the defense's case-in-chief." Inasmuch as it is apparent from this candid statement, without even consulting the record, that the defense was based almost entirely upon the testimony of the defendant's wife and mother-in-law, the state's

[Footnotes set forth at the conclusion of this opinion.]

attorney's characterization of the defense was a reasonably accurate assessment, even though in less than flattering language. The trial court, in order to make certain that the jurors, if they did interpret the remark as a reference to the defendant's failure to testify, would totally disregard it, charged them as to the defendant's right not to testify, and instructed them completely to disregard the remark in question, as fully set forth in the footnote.[4] It also should be noted that the court omitted from its charge any further clarification of the defendant's right not to testify at the express request of the defendant.[5]

[Footnotes set forth at the conclusion of this opinion.]

Under the particular circumstances of this case, it is difficult to see how the remark of the state's attorney could be interpreted as a reference to the failure of the defendant to testify or, under any interpretation, how it prejudiced him. In *State* v. *Monahan*, 96 Conn. 289, 291, 114 A. 102, this court stated, in considering an allegedly unfair comment by the state's attorney in the light of the predecessor statute to our present § 54-84: "But disobedience of this statutory rule of practice does not entitle the accused to a new trial as of right, unless it appears to have injuriously prejudiced him before the jury. And failure of the court to enforce the statute will not of itself be ground for granting a new trial, for the accused may waive its enforcement 'by neglecting to move for a discharge of the jury at the time and by proceeding without further objection or motion to an adverse ending of the trial.' *State* v. *Buxton*, 79 Conn. 477, 480, 65 Atl. 957." And in language strikingly applicable to the facts of the present case, the court continued (p. 292): "The comment objected to was not comment upon the failure of the accused . . . to testify. It neither directly referred to that fact, nor could an inference to that effect be fairly drawn from the comment. The comment was to the failure of the defense to produce evidence which was essential to the case of the accused. The statute prevents prejudice to an accused from his failure to testify; it does not prevent prejudice to his case from the failure to produce any evidence, or any sufficient evidence, to establish his case."

Even if the remark under discussion were to be construed as an oblique reference to the failure of the defendant to testify, it is difficult to see how he could have been prejudiced thereby. In *Chapman*

v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, decided after both *Monahan* and *Griffin*, the United States Supreme Court held that before an error involving the denial of a federal constitutional right can be held harmless in a state criminal case, the reviewing court must be satisfied beyond a reasonable doubt that the error did not contribute to the defendant's conviction. It further observed (pp. 21–22): "We are urged . . . to hold that all federal constitutional errors, *regardless of the facts and circumstances*, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule." (Emphasis added.) One of the "facts and circumstances" of the present case that must be considered in determining whether the error, if any, was harmful, is the overwhelming evidence against the defendant as revealed by the record and even by reference to those portions of the evidence referred to in this opinion. In *Milton* v. *Wainwright*, 407 U.S. 371, 377, 92 S. Ct. 2174, 33 L. Ed. 2d 1, the court observed: "[T]he federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court," and again (p. 372): "Assuming, arguendo, that the challenged testimony should have been excluded, the record clearly reveals that any error in its admission was harmless beyond a reasonable doubt. *Harrington* v. *California*, 395 U.S. 250 . . . [89 S. Ct. 1726, 23 L. Ed. 2d 284]; *Chapman* v. *California*, 386 U.S. 18 . . . [87 S. Ct. 824, 17 L. Ed. 2d 705].

The jury, in addition to hearing the challenged testimony, was presented with overwhelming evidence of petitioner's guilt."

Another of the "facts and circumstances" to be considered under the *Chapman* test is the fact that the trial court clearly instructed the jury to disregard the remark under consideration if, indeed, they construed it as a comment on the defendant's right not to testify. See footnote 4, supra. The court refrained from elaborating further on the defendant's constitutional right to remain silent only at the specific request of his attorney. See footnote 5, supra. We do not find that the remark under consideration constituted a reference to the defendant's failure to testify, but even if it were to be so construed, we find the court's action with reference thereto to constitute error that was harmless beyond a reasonable doubt.

There is no error.

In this opinion the other judges concurred.

NOTES [FOOTNOTES]

1. "The Court: Now ladies and gentlemen, just to bring you up to date, briefly, I indicated to you yesterday that the last witness you had heard last week, a Mr. John Spinella, who had been on the stand here before I let you go for the weekend, yesterday it was brought to the Court's attention that he had been hospitalized after he left here last week, and the condition of his health was going to be checked upon by the State. It has been reported to the Court that he is still in the hospital. He is ill. And rather than hold up this trial, the Court at this time --the Court in your absence has stricken his entire testimony from the record in this case, and at this time I not only caution you, but I order you to completely disregard his entire testimony and to dismiss it from your minds."

2. "Mr. Casella: I object, your Honor, to that last statement, hiding behind the skirts of his wife and aging mother-in-law.'

"The Court: You may be seated, Mr. Casella. You may proceed, Mr. Scanlon.

"Mr. Casella: May I have an exception?

"The Court: Exception noted."

3. In Griffin, for example, the remarks of the prosecutor (p. 611) included the following:

3. (continued)
"These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie May is dead, she can't tell you her side of the story. The defendant won't."

In Chapman, an appendix to the opinion (pp. 26-42) includes seventeen pages of the prosecutor's comments containing literally dozens of caustic references to the failure of the defendants to testify.

4. "The Court: Ladies and gentlemen, on reflection here, the point that Mr. Casella brought up as to any construction of the term 'hiding behind the skirts' of anyone, that Mr. Scanlon used here, I am going to ask you to completely disregard that. If at all, he was referring to the fact that the defendant did not take the stand, and I will later on explain that to you more fully, that the defendant does not have to take the stand. So I am going to order those remarks stricken from the record in compliance with the request of Attorney Casella, and ask you to disregard those remarks completely.
"Mr. Scanlon: May I make one statement, your Honor? That was not the purpose.
"The Court: All right."

5. "The Court: All right, gentlemen, I am about to call the jury to charge them on the law. Mr. Casella, is there something you would like to say for the record at this point?
"Mr. Casella: I would just like to state, your Honor, I filed no request to charge as to the defendant not taking the stand in this matter, and I would prefer

5. (continued)
that your Honor would give no--make no reference to that.
"The Court: Even though the Court did make some reference to the fact when the Court stated he did not have to take the stand when you moved the jury be cautioned about the remarks of Mr. Scanlon?
"Mr. Casella: Even though that is true.
"The Court: At this time, you would request the Court not to make any reference to the fact that the accused did not take the stand?
"Mr. Casella: Yes, your Honor.
"The Court: All right. The record will so indicate."